IN THE

Supreme Court of the United States.

AMBROSE P. S. STUART,
Appellant,
vs.
KENT K. HAYDEN, Receiver of the Capital National Bank,
Appellee.

} Objections to Motion to Advance.

C. C. Flansburg, *Counsel for Appellant.*

The appellant, by C. C. Flansburg, his counsel, objects to the above entitled cause being advanced on the docket for hearing during the present term, for the reason and because the facts alleged in the affidavit accompanying said motion to advance are insufficient, and because the said affidavit is untrue.

Further, because said case is not a revenue or other case in which the United States is concerned, or one which involves or affects some matter of general public interest, all of which will more fully appear from the affidavit filed herewith.

C. C. FLANSBURG,
Counsel for Appellant.

IN THE

Supreme Court of the United States.

AMBROSE P. S. STUART,
Appellant,
vs.
KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK,
Appellee.

STATE OF NEBRASKA, } ss.
LANCASTER COUNTY. }

Ambrose P. S. Stuart, being first duly sworn, deposes and says that he is the appellant in the above entitled cause; that the decree rendered in favor of the appellee, Kent K. Hayden, in the circuit court of the United States, was set aside by the circuit court of appeals for the eighth circuit, and a new decree, nearly $2,000 less in amount entered.

Affiant denies that this cause is the cause of any delay in the winding up of the affairs of the said bank, but alleges the fact to be that there is now pending in the United States circuit court, within and for the district of Nebraska, a suit by Kent K. Hayden, the appellee herein, as receiver of the Capital National Bank, against the appellant herein, and others, former stockholders of the said Capital National Bank, to recover from the said stockholders all dividends paid to them during the existence of said bank; and the

amount demanded by the prayer of said bill, and for which it is alleged the defendants are liable, is in excess of the sum of two hundred thousand dollars ($200,000): that by consent and agreement of counsel for complainant and respondents, the time for taking testimony in said cause has been extended to the 1st day of March, 1897, and said cause cannot be heard before the May, 1897, term of said circuit court, so that in no event could the trust be wound up, as alleged in the motion to advance said cause, if the cause herein pending is speedily heard.

AMBROSE P. S. STUART.

Subscribed in my presence, and sworn to before me this 30th January, A.D., 1897.

R. O. WILLIAMS,
Notary Public.

No. 151 & 160.

NOV 8 18
JAMES H. McKENN

Brief of Appellees for Appts. in 160

SUPREME COURT

OF THE

UNITED STATES.

Filed Nov. 8, 1897.

No. 151.

AMBROSE P. S. STUART,

Appellant,

vs.

ENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA; AUGUST T. GRUETTER AND CHARLES F. JOERS.

FILED MARCH 30, 1896.

No. 160.

AUGUST T. GRUETTER AND CHARLES F. JOERS,

Appellants,

vs.

AMBROSE P. S. STUART AND KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK, OF LINCOLN, NEBRASKA.

FILED APRIL 27, 1896.

BRIEF OF APPELLANTS, AUGUST T. GRUETTER AND CHARLES F. JOERS.

JOHN H. AMES,
Solicitor for Appellants, Gruetter & Joers.

JACOB NORTH & CO., PRINTERS AND STATIONERS, LINCOLN, NEB.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 151.

AMBROSE P. S. STUART,
Appellant,
vs.
KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA; AUGUST T. GRUETTER AND CHARLES F. JOERS.

FILED MARCH 30, 1896.

No. 160.

AUGUST T. GRUETTER AND CHARLES F. JOERS,
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vs.
AMBROSE P. S. STUART AND KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA.

FILED APRIL 27, 1896.

JOHN H. AMES, *Solicitor for Appellants, Gruetter & Joers.*

BRIEF OF APPELLANTS, AUGUST T. GRUETTER AND CHARLES F. JOERS.

STATEMENT OF FACTS.

Concerning the facts disclosed by the record in this case there is and can be little or no disagreement.

On the 17th day of December, 1892, the appellees and cross complainants, Gruetter & Joers, were the owners of certain real property in the city of Lincoln, Nebraska, of the fair value of $67,500 (see testimony of Stuart, record, pages 29 and 30).

It is alleged both in the cross bill of Gruetter and Joers (record, page 19, and in the answer of Stuart thereto, record, page 214) that on that day Gruetter & Joers sold and conveyed this property to Stuart for the agreed purchase price of $67,500, receiving in part payment therefore 150 shares of the capital stock of the Capital National Bank, of Lincoln, Nebraska; to quote the language of said answer, "at and as of the value of $18,000." Especial attention is invited to the language of these pleadings, because it is expressly alleged in both of them that there was a sale of the property for a cash consideration, and that the shares of stock were accepted in lieu of cash at an agreed valuation.

There is no pretense in the pleadings or testimony that there was a trade or barter of the property for the shares, or *vice versa*.

It is not disputed that for a period of about ten years

next previous to this transaction Stuart had been, and was then, a member of the board of directors and of the finance committee of said bank, upon the books of which these shares all that time stood in his name, nor that these facts were known to Gruetter & Joers and were an especial inducement to them to rely upon his statements and representations as to the value of the shares and condition of the bank, upon the supposition that he had superior opportunities for intimate and accurate knowledge of these matters and interested motives for availing himself of them. Stuart himself says (record, pages 30 and 31) that, as a matter of fact, he was customarily in the bank almost every day, and that, as a member of the committee, he "examined the paper" once in three months.

It is not denied that on the day on which the sale was made a copy of a statement of the condition of the bank at the close of business on December 9, which showed the shares to be worth 10 per cent premium, was published in one of the Lincoln papers over the signatures of the officers of the bank, nor that this statement was discussed by the cross complainants and Stuart, and was a considerable inducement to the former to accept the shares, nor that similar statements making a like favorable showing and purporting to give the condition of the bank on the 25th day of September, 1891, the 1st day of March, 1892, the 2d day of December, 1891, the 17th day of September, 1892, and subscribed by Stuart as director, had been published in the same paper and had come to the knowledge of the cross complainants and influenced their judgment in appraising the stock and deciding to accept it. Stuart (record, pages

32 and 33) concurs with cross complainants (record, pages 144–156) that, as an inducement to the latter to accept the shares at the price named, he told them that the bank stock was "all right," and that the bank was in a safe and sound condition, that the bank examiner had then recently thrown out *all* the bad paper, amounting to $30,000, and that he had shortly before been offered $125 per share for his stock, but had refused to sell because he did not know another so safe and profitable an investment, or words to that effect, and that "if he could make a turn or two shortly he would be glad to take the stock back at the very price he was being paid for it, because it paid him from 12 to 20 per cent per annum." Before concluding the sale, Gruetter applied to Outcalt, the cashier of the bank, to know the value of the shares, informing him that the inquiry was made with a view to purchasing, and was told by him, in effect, that they were worth from 30 to 40 per cent premium. Such were the representations. The facts were that the bank then was, and for many years prior thereto had been, hopelessly insolvent.

These facts are clearly established by the uncontradicted testimony of receiver Hayden, pages 94–135 of the record, which it could serve no useful purpose to reprint here. Of its bills receivable less than $60,000 in amount were good; less than $142,000 in amount could be graded so high as "doubtful"; and more than $550,000 were absolutely worthless at the date of suspension—thirty days after the date of the above mentioned sale. At the date of suspension also the total liabilities of the bank were $1,463,013.17. The remaining assets of the bank consisted of vacant and

unimproved lands of no estimated practical value, and of $15,385.87 cash on hand.

How much Stuart knew about this state of affairs is to be inferred from his relations to the bank and his guarded admissions as a witness. He says (record, page 36) that he had been for a long time dissatisfied with the management of the bank by its president and cashier, Mosher and Outcalt, and that he said as much to the witness, Gerner, while discussing the advisability of the purchase from cross complainants (see also testimony of witness Gerner on page 140 of record).

He knew that there was a loss by Donald, Losson, and Simpson (record, page 54). The actual amount of that loss was $40,800 (record, page 107). He knew of the loss of $14,000 by the Sherman County Banking Company (record, page 54). He knew (record, page 50) that $40,000 to $50,000 had been tied up in land in what is called the Small transaction. He knew (record, page 53) that a large sum, as a matter of fact nearly $50,000, was tied up in York county land through a deal with E. W. Mosher, a brother of the president. He knew (record, page 53) that some $45,000 or $50,000 had been loaned to E. W. Mosher, who was worthless. He knew (record, pages 48, 49) that the bank was carrying some, but claims not to have known how much, of the spurious Western Manufacturing Company paper. In fact, at the date of suspension, the bank had on hand of this paper $125,000 in amount, and it was liable upon rediscounts of the same for $110,000 more (see record, page 103). He knew (record, page 53) that money of the bank was being sent to E. W. Mosher, at York, to

be loaned upon real estate mortgages. He knew (record, page 63) that both the president and cashier were loose in their private conduct and morals, and he had repeatedly but ineffectually protested to both the president and cashier concerning their conduct and their being engaged in too many enterprises, not all of them of the most reputable kind (see record, pages 36, 141, 136).

He knew or had heard (record, page 49) that the bank was carrying some $30,000 in amount of worthless so-called Marsh paper, which had been put in by Mosher in payment of his stock subscription. Much more to like effect might be quoted from the record, but enough has been said already to prove that he must have known, and did know at the time he made this purchase, that the bank was hollow to the core, and that its certificates were valuable only as obligations in favor of its creditors.

The sale was completed on the 17th day of December. A transfer of the certificates upon the books of the bank was effected January 3. On the 22 of the latter month, Sunday, the fact became public that on the preceding day the institution had been closed by the bank examiner, and was probably insolvent, though it was not then, nor for some weeks thereafter, supposed by cross complainants nor by the public that a stock assessment would be required to meet its obligations.

On the 11th day of August, 1893, the complainant filed in the Circuit Court of the United States for the district of Nebraska his bill against Ambrose P. S. Stuart, sole defendant (record, page 1.) This document, after reciting the

incorporation and insolvency of the Capital National Bank, the appointment of the receiver, and the ascertainment by the comptroller of the currency that it was necessary to make a one hundred per cent assessment upon the stock of the bank, and the execution and issuance of his order or proclamation to that effect, charges that on or about the third day of January, 1893, Stuart sold and caused to be transferred on the books of the said bank by proceedings regular in form, but colorable only and not made in good faith, his one hundred and fifty (150) shares of stock to Gruetter & Joers; who, the bill alleges, upon information and belief, are and were at the last date aforesaid pecuniarily irresponsible persons from whom the assessment could not be made, and prays that the sale and transfer may be adjudged to be sham and pretended and Stuart held responsible for the assessment as though the same had not been made. To this bill the defendant Stuart filed a demurrer (record, page 6) the second clause of which is as follows: "And for further cause of demurrer, this defendant shows that it appears by said plaintiff's said bill that Gruetter and Joers (the parties therein named as the alleged fraudulent transferees of said shares of bank stock) are residents within the jurisdiction of this Court and are necessary parties to said bill, and the said Gruetter and Joers are not named as parties thereto." Afterward and on the 9th day of January, 1894, the complainant submitted to the said demurrer and obtained leave (record, page 7) to file an amended bill of complaint making Gruetter & Joers defendants thereto, and the same day filed an amended bill (record, page 8) which did not differ materially from the original bill, except that Gruetter & Joers were made parties thereto and required by sub-

pœna to appear and make answer. On the 24th day of February, 1894, in obedience to this subpœna, Gruetter & Joers did appear (record, page 11) and filed their answer to the said amended bill. This answer denies all manner of collusion and combination between them and said Stuart, and avers that they became the transferees of the stock in good faith and for value and without any intent on their part to defeat the bank or its creditors or prevent the collection of the assessment, and without any knowledge or suspicion on their part that the bank was or was likely to become insolvent, or that its capital had been impaired, but that they had been induced by Stuart, through certain fraudulent representations and wrongs, to purchase said stock at the sum of eighteen thousand ($18,000) dollars, which was at a premium over the par value of the shares of twenty per cent, and that while it was the object and intent of the said Stuart to escape liability as a share holder in the bank, which he knew, or had reasons to believe, was, or was likely to become, insolvent, his purpose was to effect such escape by shifting the liability upon these defendants. On the 20th day of March, 1894, the defendants, Gruetter & Joers, obtained leave to file and did file their cross bill, (record, page 19) setting forth substantially, but at greater length and with more particularity, the facts contained in their answer to the amended bill, and prayed subpœna against the complainant and defendant, Stuart, and that the transfer of the stock might be decreed to be fraudulent and void against them, and the same set aside, and the said Stuart reinstated upon the books of the bank as a stock holder therein; and that he be adjudged to pay the amount of the assessment, and that the complainant, Hayden, the re-

ceiver, be required to exhaust his remedies against said Stuart before resorting to cross complainants, and that Stuart be adjudged to maker estitution to the cross complainant of the eighteen thousand ($18,000) dollars, purchase price of the stock, together with interest thereon.

Cross bill also sets out more fully than the answer of the same parties the fact that they acquired the stock from Stuart in part payment of purchase price of certain real estate which they sold and conveyed to said Stuart on the 23d day of December, 1892. Stuart answered both amended bill and cross bill, putting in issue all the material allegations of both documents. Replications were filed and proofs were taken, and the case went to hearing and decree in the said court on the 23d day of April, 1895. This decree was passed both upon the amended bill and the cross bill, but was in all respects as prayed by the cross-bill (see record, page 219). From this decree Stuart prosecuted an appeal in the United States Court of Appeals for the eighth circuit, and by it an order was entered reversing the decree, and remanding the case to the Circuit Court, with directions to enter a decree to the effect that the transfer of one hundred and fifty shares of stock from Stuart to Gruetter & Joers was fraudulent and voidable as to the receiver Hayden; that it be held for naught as to him, and that he recover of Stuart the assessment levied thereon with his costs; that the appellees, Gruetter & Joers, are entitled to no relief against Stuart in this suit, but that their supposed cross bill be dismissed, and that Stuart recover from them his costs thereon (record, page 237). From this decree of the Circuit Court of Appeals,

Stuart and defendants, Gruetter & Joers, prosecute separate appeals to this court.

The assignment of errors by the appellants, Gruetter & Joers (record, page 245), is as follows:

"And as reasons for and for the purposes of said appeal the said August T. Gruetter and Charles F. Joers now here, by their counsel, John H. Ames, make and assign the following assignments of error prejudicial to them, which they allege to have intervened in and to be disclosed by said record, proceedings, and judgment.

First—The court erred in holding that the cross bill of these defendants, August T. Gruetter and Charles F. Joers, does not state the facts sufficient to confer upon the Circuit Court of the United States for the district of Nebraska jurisdiction in equity to grant the relief prayed for in said cross bill.

Second—This court erred in holding that the evidence and testimony disclosed by the records in this cause do not disclose facts sufficient to entitle these defendants, August T. Gruetter and Charles F. Joers, to the relief prayed for in their said cross bill.

Third—This court erred in holding that the defendants, August T. Gruetter and Charles F. Joers, were or would not have been entitled to the relief for which they prayed in their cross bill, except upon condition that they should rescind or offer to rescind the sale of their real estate to the appellant Stuart, and restore or offer to restore to said Stuart the sum of nineteen thousand five hundred ($19,-

500) and interest thereon paid them by said Stuart as part consideration of said sale.

Fourth—This court erred in holding that by delay or by beginning of an action in the State Court or otherwise the defendants, August T. Gruetter and Charles F. Joers, had waived or abandoned the remedy sought, or the relief prayed for in their cross bill, or had made an election of remedies inconsistent with a demand for such relief in this suit.

Fifth—This court erred in entering a judgment directing the dismissal of the cross bill of these defendants, August T. Gruetter and Charles F. Joers.

Sixth—This court erred in entering a judgment vacating or directing the vacation of the decree of the Circuit Court of the United States for the district of Nebraska, in so far as said decree adjudged that the appellant Stuart should make restitution to said defendants in the sum of twenty thousand nine hundred and five ($20,905) dollars.

Seventh—The court erred in entering judgment vacating or directing the vacation of the decree of the Circuit Court of the United States for the district of Nebraska, in so far as said decree adjudged that the sale, transfer, and assignment of the shares of the capital stock of the Capital National Bank from the appellant Stuart to these defendants, August T. Gruetter and Charles F. Joers, was and is void as against said Gruetter & Joers, and that the same be canceled, set aside, and held for naught, and that said shares of stock be reinstated upon the books of the bank in the name of said appellant Stuart.

Wherefore these defendants, August T. Gruetter and Charles F. Joers, pray that the said appeal may be allowed, and that the said judgment and decree of this court may be in the respects aforesaid modified and reformed or be reversed, vacated, and set aside, and that the decree of the Circuit Court of the United States for the district of Nebraska may be in all things reinstated, affirmed, and enforced."

BRIEF.

I.

These facts made it apparent to Gruetter & Joers that $18,000 in amount of the consideration price, for which they had sold and conveyed their property to Stuart, had wholly failed, and on the following day, January 23, they brought suit for its recovery in the State Court. That suit is now pending. That suit, so far from being, as counsel for appellant contends, an affirmance of the transfer of the stock, is a distinct and expressed repudiation of it, and so far from being an action for the recovery of damages and for fraud or breach of warranty in the sale of the shares as to be an action to recover the unpaid residue of the purchase price of their property, the title of which Stuart had fraudulently obtained without consideration, to the extent of $18,000. Had it not been for the fact developed later, that shareholders are liable to an assessment by the comptroller of the currency, that action would have afforded cross complainants a complete remedy, and their recovery upon the above facts cannot be doubted. But the fact of the assessment put an entirely different face upon the matter. It would be a very slight advantage to Gruetter & Joers to re-

cover the $18,000 residue of purchase money if they should be compelled to pay the receiver $15,000 and interest as an assessment upon the shares of stock. They can be relieved of this latter liability only by a Court of Equity having the power to set aside the assignment and transfer of the stock as having been procured by the fraud both of Stuart and of the bank through its officers and agents. It would be a violation of every precedent and principle of equity to require that they should first pay this assessment and then be remitted to their action against Stuart, who is shown by the record to have conveyed away all his property, in order to obtain reimbursement.

They have done no wrong. They have not been guilty of even a slight degree of negligence. On the contrary, they are shown to have adopted every precaution, in this transaction, which could have been reasonably expected from the most experienced, careful, and prudent business men. But whether such an action may be maintained at all and if a right to maintain it exists under any circumstances, whether it exists under the circumstances of this case, whether persons who have been tricked and defrauded, in the manner in which cross complainants have been tricked and defrauded, into the assumption of the nominal attitude of shareholders, are in fact shareholders within the meaning of section 5151, of the Revised Statutes, whether the pretended transfer ought not to be set aside and Stuart reinstated as the shareholder of the bank, and the receiver restricted to his remedy against him for the recovery of the assessment, or whether the receiver ought not to be required, first, to exhaust the property of Stuart before re-

sorting to that of Gruetter & Joers, whether, at the worst, Gruetter & Joers are not to be regarded, in equity, as being in the attitude of sureties for Stuart's liability upon the assessment, and, if compelled to pay it, entitled to be subrogated to the rights and remedies of the receiver against him for reimbursement, are all Federal questions involving the construction of the laws of congress, with which the Federal Court, regardless of the citizenship of the parties, is alone competent to deal. Certainly the State Court cannot restrain the receiver from proceeding with what he regards as the performance of his duty under the authority of the United States, and certainly, unless it can do so, its decree setting aside the transfer and reinstating Stuart as shareholder, and adjudging him to be solely liable for the assessment, would be wholly nugatory. It is equally certain that a court which has sole jurisdiction of a controversy between parties has the right, and is charged with the duty, to finally adjust and determine all the rights and obligations involved in the suit, and not only setting aside conveyances and decreeing titles, but, when necessary, awarding compensation.

All these propositions seem to be as well settled as anything can be settled by principle and judicial authority, and if such is the case the decree of the Court below is in all things right and ought to be affirmed.

II.

It is contended by counsel for appellant that the Circuit Court had no jurisdiction, first, because of the citizenship of the parties, and, second, that the matter sought to be liti-

gated is not of equitable cognizance. It is alleged in the cross bill and proved in the record that Gruetter & Joers were induced to make the purchase by fraudulent representations and warranties by Stuart, and by false, fraudulent, and misleading statements and representations made by the bank and its officials, upon which they relied.

As to the second of these contentions, it is, I think, established beyond controversy that the matter is of equitable cognizance. "Equity" says the Supreme Court in Jones vs. Bowles, 9 Wallace, U. S., 364, "has always jurisdiction of fraud, misrepresentations, and concealment, and this does not depend upon discovery." That was an action by stockholders to enjoin the collection from, or payment by, a corporation of the purchase price of a tract of land, the complainants having purchased their stock from the defendant Jones, who was seeking the recovery of the purchase price upon his representation that the company owned the land. The situation in many of its essential features was very like that of the parties in the case at bar. The courts say, speaking by Mr. Justice Bradley: "It is objected that a Court of Equity has no jurisdiction of the case because the law affords a complete remedy in damages; this objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation, and concealment, and it does not depend upon discovery; but in this case a Court of Law could not give adequate relief. The agreement complained of is perpetual in its nature, and the only effective relief against it, where the keeping of it on foot is a fraud against parties, is the annulment of it. This cannot be decreed by a Court of Law, but can by a Court of Equity."

The Court also held that the corporation was a proper party, although no relief was sought against it. In this case relief is sought against the bank and receiver by being relieved from obligation for the assessment.

The Florida Land and Improvement Company vs. Mer rill, 52 Federal Reporter, 77, decided by the Circuit Court of Appeals for the fifth circuit, is very similar to the case at bar. Complainant had sold to one Winegar, president of the First National Bank of Palatka, Florida, a large tract of land, receiving in part payment therefor 100 shares of the capital stock of the bank at $115 per share. The purchase of the stock was induced by representations made by Winegar very similar to those made by Stuart in this case. Six months after the trade, instead of within thirty days as in the case at bar, the Palatka bank failed, and the defendant Merrill was appointed receiver. The bill was filed to rescind the purchase and relieve the complainant from liability to an assessment as shareholder, and to recover the purchase price. Upon demurrer it was held that the complainant was entitled to the relief prayed. The only respects in which the above case differs from this are, first, that the stock sold by Winegar really belonged to the bank, and, second, the citizenship of the parties was different. I do not think that either difference is important. In both cases the vendor of the stock was a prominent officer of the bank, having familiarity with its condition, and affairs, and in both cases the frauds and misrepresentations were known to the bank, which, with its creditors and depositors sought to profit thereby. The claim that the creditors of the bank could not be deprived of the purchase price of the stock, or

of the right to resort to the personal liability of the transferee as shareholder, was strenuously urged by counsel and distinctly repudiated by Judge Pardee, who wrote the opinion of the Court of Appeals. It is true that especial stress is put by the Court upon the fact that the bank was the real owner and vendor of the shares. In view, however, of the fact that the National Banking Act forbids a bank to be the owner of its own stock, and that the liability, if any, of the transferee to assessment is the same in both instances, I do not see how this fact alone affects the right of the transferee to be relieved from liability. The liability of the shareholder is a trust fund and an asset in the hands of the receiver of exactly the same nature and character as any other property or choses in action belonging to it. In both cases the liability as against the complainant was procured by the bank through the frauds and misrepresentations of its officers and agents. It would be as unjust to permit it or its creditors to profit thereby in the one case as in the other, and for precisely the same reasons. A case very similar to the foregoing, and to the same effect, is Upton vs. Englehart, 3 Dillon, 496.

Bowden vs. Johnson, 107 U. S., 251, holds that the transfer by a shareholder of his shares to an irresponsible transferee upon the eve of insolvency, for the purpose of escaping liability to an assessment, may be set aside in equity at the suit of the receiver and the liability of the original shareholder restored and enforced. If one party affected by the transaction may have this remedy, why may not the other? Both the original bill and the cross bill in the case at bar allege that Stuart made this transfer for the purpose, among

other things, of escaping this obligation. Why will not equity in this case, as in others of similar nature, avoid circuity of action and protect the assignee by rescinding the transaction and compelling a resort, in the first instance, to the fraudulent assignor? And are there not especial reasons for doing so when the bank was party to the fraud? The general doctrine that equity will entertain a bill by the purchaser to rescind a sale of corporate shares which was induced by the fraud of the vendor, and that the corporation is a proper and necessary party to said action, is well exemplified by the case of Booth vs. Smith, 117 Illinois, 370, and by Peek vs. Gurney, 13 L. R. Equity Cases, 79. To the same effect Pomeroy Equity Jurisprudence, paragraph 881, and note; Hill vs. Lane, 11 R. L. Equity Cases, 215; Martin vs. Hill, 43 N. W. (Minn)., 337. But I forbear from further citations. While I have found many authorities in support of this doctrine, I have found none to the contrary, and believe it to be as familiarly established as any principle in our jurisprudence.

III.

If, then, equity has jurisdiction of a bill to obtain a rescission, and the corporation or its representative, the receiver, is a necessary party thereto, of which I have no doubt, it can as little be questioned that the Circuit Court had jurisdiction of the matters alleged in the cross bill and would have like jurisdiction of an original bill having the same object, notwithstanding the parties thereto are all citizens of the same state.

In the first place the cross bill, as is abundantly shown

by the Florida Land & Improvement Company vs. Merrill, 52 Federal Reporter, 77, cited above, calls for the construction of the laws of the United States, viz., for the determination of force and effect of the provision of the National Banking Act with respect to the assessment of shareholders of insolvent associations, and as to who are shareholders within its meaning. This is so obvious, it seems to me, as to preclude the necessity, if not the possibility, of argument in its support.

But there is another reason for holding that this court has jurisdiction of the matters alleged in the cross bill, which is, that the cross complainants seek thereby to affect and control the conduct of the receiver of the Capital National Bank, and to limit and restrain his remedies with respect to enforcing the liability of the shareholders of the bank. The case therefore falls within the principle in Grant vs. The Spokane National Bank, 47 Federal Reporter, 673, which was a suit by a citizen of the state of Washington, in which the bank was situated, brought for the purpose of controlling the official conduct of the receiver of the bank, in so far as to secure a particular application of a portion of the funds in his official custody in satisfaction of a claim of the plaintiff against the insolvent bank, for money received by it as collecting agent, and which was held for that reason alone to be a suit arising under the laws of the United States. And in Sowles vs. The First National Bank of St. Albans, 46 Federal Reporter, 513, it was held "a suit against a national bank, to reach property held as a part of its assets by its receiver, appointed by the comptroller of the currency, arises under the laws of the United States,

and may be removed from the State Court into the Federal Court," without reference to the citizenship of the parties. There is, perhaps, no occasion for discussing the extent of the remedy which this Court ought to afford to the cross complainants. Your honors are familiar with the general proposition laid down in a great many decisions by the Circuit and Supreme Courts of the United States, that an original bill and a cross bill thereto constitute but one cause, and that when a Circuit Court has jurisdiction of the former for any reason it has jurisdiction of the latter without reference to citizenship. Thus it is held, to cite one case out of a great many, in the First National Bank of Salem vs. The Salem Capital Flour Mills Company, 31 Federal Reporter, 580, "in a suit to foreclose a mortgage, a prior mortgagee is a proper party defendant, and when so made party he has a right to file and maintain a cross bill for the purpose of having the lien of his mortgage enforced, and procuring a determination of any question concerning its priority or validity that can arise and be litigated between himself and any or all of the parties to the original bill."

IV.

It seems to me also to require no argument to establish that the cross complainants have no adequate remedy other than that which they now seek. It would be extremely inequitable and unjust to compel them, after having been swindled out of $18,000 by the frauds and misrepresentations of Stuart, assisted and participated in by the bank and its officials, to pay the further sum of $15,000 to the receiver, and to look to their fraudulent vendor for reimbursment both of this latter amount and of the purchase price.

Whether or not the Court can, as I think, adjust all the rights of all the parties and compel a restitution by Stuart of the purchase money in this action, it seems very clear to us that the cross bill ought to be retained for the purpose of rescinding the transaction so far as to relieve the cross complainants of liability to the receiver, and to compel him to resort to Stuart alone for the recovery of the assessment. If the time-worn maxim that "fraud vitiates everything" has not lost its meaning, the transfer of the shares is, at the request of Gruetter & Joers, simply void, and if it is void in any respect it is wholly void, and all the rights and obligations of all the parties, except the right of Gruetter & Joers to recover the purchase money, remains in all respects as though it had never taken place.

The ability and experience of counsel for Stuart seem to forbid the assumption that he will contend that the solvency of the bank and the value of the shares were not, under the circumstances of this case, a legal subject of fraudulent representation and warranty. Otherwise the following authorities will, I think, sufficiently establish that they were :

2 Pomeroy Equity Jurisprudence, paragraph 878 and note.

Cole vs. Cassidy, 138 Mass., 437.

National Bank of Dakota vs. Taylor, 58 N. W. R., 297.

Allen vs. Hart, 72 Ill., 104.

Pickard vs. McCormick, 11 Mich., 68.

Swimm vs. Bush, 23 Mich., 99.

Morgan vs. Dinges, 23 Neb., 271.

Kerr vs. James, 39 N J. Eq., 527–543.

The foregoing authorities also establish the proposition that a bank director will not be heard to say that he was innocently mistaken in making untruthful statements concerning the condition of the bank and the value of its stocks in which he was dealing with outsiders.

The foregoing authorities, also, as well as many others, assert the doctrine, which is not, so far as I know, seriously controverted anywhere, that a positive assurance by a vendor of a fact as within his knowledge, which turns out to be false, is itself a fraudulent representation which entitles the vendee to maintain an action to rescind or for damages.

Drake vs. Grant, 4 N. Y. S., 899.
Bullitt vs. Farrar, 43 N. W. R., 566.
Cole vs. Cassidy, 138 Mass., 477.
Chatam Furnace Co. vs. Moffit, 147 Mass., 403.
Chatam Furnace Co. vs. Moffit, 18 N. E., 168.
Wilber vs. De Can, 18 Minn., 421.
National Rank North Dakota vs. Taylor, 58 N. W. R., 297.
Edgington vs. Fitzmaurice, 22 C. L. J., 81.
Kerr on Fraud and Mistake, 54–68–69.
Bigelow on Fraud, 511–513.
Webb's Pollock on Torts, 357–8.

V.

But the Court of Appeals held that the Circuit Court had no jurisdiction of the cross bill because the receiver was entitled to have the transfer from Stuart to Gruetter & Joers se aside upon the mere showing that they were less

able to respond pecuniarily to the demands of the receiver and the creditors of the bank than was Stuart. Says the opinion, "The question was not, therefore, whether the transferees were solvent or insolvent at the time of the transfer, but whether or not the individual liability of the transferees was as valuable as that of the transferer. If it was not, the creditors were damaged, and the fraud was actionable. The evidence leaves this question without doubt." And therefore, says the court, in effect, the transfer could be set aside at the instance of the receiver alone, and the presence of Gruetter & Joers and their cross bill was unnecessary, and the Circuit Court had no jurisdiction of the latter. But suppose the evidence had not left this question without doubt; suppose the Circuit Court was and is, not only in doubt, but clearly of the opinion that the pecuniary ability of Gruetter & Joers was and is as valuable as that of Stuart. Suppose, hence, that it clearly and conclusively appears that, although Stuart knew of the insolvency of the bank, he not only had no actual intent to defeat the receiver and the creditors by means of the transfer, but that the transfer, if upheld, would not have that effect, and that his sole intent and the sole effect of the transaction, if unimpeached, was and will be to defraud Gruetter & Joers. What then? Wouldn't both the original bill and the cross bill have been dismissed and Stuart permitted to go unwhipt of justice? Or, should the cross bill still have been dismissed and a decree for the assessment passed upon the original bill against Gruetter & Joers? Or, should the decree have been that which was in fact entered by the Circuit Court based upon both the original bill and the cross bill? Does the jurisdiction of a court over a contro-

versy depend upon the degree of evidence with which one or some of the parties thereto is or are able to support his or their contentions? Much stress is put by counsel for Stuart and by the Court of Appeals upon the fact that Gruetter & Joers admit and allege in their answer that the intent of Stuart in making the transfer was as well to escape liability as a stockholder, and thus to cheat and defraud the creditors of the bank, as also to shift the liability upon themselves and by so doing to cheat and defraud them out of their property. And so it is contended, in effect, that, having confessed the bill, or at least waived all defense to it, there is no office which their cross bill can fill in the litigation. There are, however, three essential allegations of the bill which are not confessed by the answer and which are not only not proved in the record but are emphatically negatived thereby. These three allegations are: first, that the transfer of the stock was collusive, or pretended, or sham; second, that at the date of the transfer to them they were insolvent, although they admit that the transaction, together with the failure of the bank, resulted in their subsequent insolvency; and, third, that Stuart had any knowledge, notice, or suspicion that they would not be able to respond to an assessment, should one be made in case of failure of the bank. In other words, it is not admitted by anybody, nor is it proved, that Stuart had any actual intent to defraud the bank or its creditors, or that the result appeared to him or to anyone as the natural or probable consequence of the transfer at the time it was made. Are not these allegations or some of them essential? Would a bill framed according to the rule laid down by the Court of Appeals have successfully withstood a demurrer? Would a

bill by the receiver have been sufficient, which alleged merely the organization of the bank, its insolvency, the appointment of a receiver, the making of an assessment, that Stuart had been a stockholder, and that some time before the failure of the bank he became apprehensive of that event and sold and transferred his stock to Gruetter & Joers whose "individual liability was less valuable" than, his own? Is the question of intent immaterial? Is a stockholder in a national bank, which is threatened with insolvency, who sells his stock to a supposedly, and at that time in fact, entirely responsible purchaser, who is as fully informed as to the condition of the bank as he is himself, but who for some reason is willing to incur the risk, an absolute guarantor of the pecuniary responsibility of his transferee? If so, for how long a time does the guaranty continue? What is there in the National Bank Act or the analogies of the law which forbids a stockholder, acting in good faith and without negligence, from contracting with some other person of supposed responsibility to accept his shares and assume his liability? I confess that I do not know nor have I found any adjudicated case, except this, in which a transferer of such stock has been held subsequently liable for an assessment thereof, except the transfer was collusive or intentionally made to one known to be pecuniarily irresponsible or there had been some other similar element of actual fraud. I think that the furthest this court has ever gone, and as far as it can go consistently with the statute and the analogies of the law, is in the following language from the opinion in Bowden vs. Johnson, 107 U. S., 251: "Where the transferer possessed of information showing that there is good ground to apprehend the failure

of the bank, colludes and combines, as in this case, with an irresponsible transferee *with the design* of substituting the latter in his place, and thus leaving no one with any liability to respond for the individual liability imposed by the statute, in the respect of shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to show that there was a full or partial consideration for the transfer as between him and the transferee."

With this rule there can be no complaint because the guilty knowledge and the fraudulent intent are both present. But that is not the case at bar. Here there was the knowledge of impending failure, but there was no intent or design to defeat the creditors of the bank. There was no collusion or combination, and both parties intended that there should be nothing sham or colorable about the transaction.

In Pauley vs. State Loan and Trust Co., 165 U. S., 606 (17 Supreme Court Reporter, 465), there is a generalre view of the decisions of this Court upon the subject, and one of the rules relating thereto as laid down in the opinion is as follows: "That if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, *with the intent simply to evade* the responsibility imposed by section 5151 on shareholders of national banking associations, each owner may be treated, for the purposes of that section, as a shareholder and liable as therein prescribed."

No fault can be found with this rule, but Stuart's intent was not so simple. His purpose was not only to evade his own liability but to impose the liability upon Gruetter & Joers, whom he believed to be abundantly responsible. It is true that in Bank vs. Case, 99 U. S., 628, Mr. Justice Strong, speaking for the Court, quotes with approval the following language from Thompson's Commentaries on Corporations, paragraph 3259: "A transfer of shares in a failing corporation made by the transferer with the purpose of escaping his liability as a stockholder, to a person who from any cause is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferree it was out and out." And the opinion cites certain judicial decisions as supporting the proposition. These authorities, which Mr. Justice Strong seems to have taken without careful examination, do not support the proposition without qualification. In all the cases cited in the opinion, or in the note, in which the liability was enforced against the transferrer, it was shown by direct testimony or by circumstances, or both, that he knew or had good reason to believe that the transferee was insolvent or likely soon to become so, or that the transfer was sham or collusive with the intent on the part of the transferer not simply to escape liability, but to defeat the company and its creditors of any remedy against any responsible persons. All these features are entirely absent from the case at bar. Several of the authorities cited by Mr. Thompson expressly negative the proposition above quoted from his text. Thus Miller vs. The Great Republic Insurance Co., 50 Mo., 55, is quoted with approval in Provident Savings Institution vs.

The Jackson Place Skating and Bathing Rink, 52 Mo., 557, as having held: "That where before execution against a corporation the stockholder honestly and without any intention to defeat the creditors of the company sold and transferred his stock, the mere fact that the purchaser was insolvent at the time was not sufficient to hold the stockholder liable for the debts."

In Marly vs. Clark, 17 Mass., 329, the Court goes no further than to hold: "We cannot doubt, then, that a transfer of an interest in the stock of such corporations not *bona fide, but for the purpose of defeating the creditors of the company*, is fraudulent and void." The italics are mine. This seems to me to be the true rule. It is not the intent of the transferer to escape liability, but his intent to defeat the creditors and stockholders of the company, which renders the transfer fraudulent and void. This rule is in harmony with legal analogies; the other is not. This rule places no undue or unnecessary restraint upon the right of transfer which it is the policy of the law to promote; the other hampers and restricts it without cause. Consequently, the Supreme Court of California in Moore vs. Boyd, 74 Cal., 167 (15 Pac. Rep., 670), distinctly and expressly repudiates the Thompson rule. In fact, if the rule were as stated by Thompson it would never be pertinent to inquire whether the transferee was solvent or insolvent. The necessary effect of a transfer of stock in a national bank is to relieve the transferrer of liability. He must be conclusively presumed to have intended the inevitable consequences of his own act. Hence, all that would be necessary for the receiver to show, under this rule, would be that

the bank was insolvent within the legal knowledge of the transferrer at the time of making the transfer. Except in the case at bar, no Court has ever so held. If this was the law, the inquiry discussed in Thompson's paragraph No. 3261 and by the decisions cited in his notes to that paragraph would be of no importance. That inquiry is important, however, because it helps to determine the question, not whether the transferrer intended to escape liability, but whether he intended to defeat the corporation and its creditors, and can be important for no other purpose.

I hope your honors will pardon me for concluding this part of the argument with the following illustration: I am the owner of a hundred shares of stock in the Skagway National Bank, of which I am also a director. I believe, from facts within my knowledge, that the capital of the bank is to some extent impaired and am, on that account, apprehensive of its failure and insolvency. My friend Jones, whose knowledge of the condition of the bank is equal to my own, is the owner of a placer mine on the Klondike which he wishes to sell. I have no doubt nor reason to suspect that Jones is not well to do and abundantly able to respond to an obligation for ten thousand dollars. I go to him and say, "Jones, you know all about the Skagway bank. I am afraid it is about to fail. On the other hand, you think it is safe. Now, you want to sell your placer diggings on the Klondike. I will give you my stock in the bank for your claim." "All right," says Jones, "I am satisfied the bank is all right, and I will trade." And we do trade. Shortly afterwards, it turns out that I was right and Jones was wrong. The bank fails, and the

failure of the bank, together with various other unfortunate business transactions, cause the failure of Jones also, equally to his surprise and my own. Whom have I wronged, actually, intentionally, or constructively? An event has taken place which the bank, its stockholders and creditors, Jones, nor myself, in the exercise of reasonable intelligence and prudence did not foresee and could not have foreseen. Fraud is defined to be a deceit by which another is misled to his injury. I have not deceived anybody, nor even innocently misled anybody by my conduct. All that I have done has been in full agreement with the strictest ethical rules of conduct. Why should I be punished by being compelled to pay the comptroller's assessment? There is only one answer. It is not that *ita lex scripta est*, because the law has never been so written, but it is that Seymour D. Thompson, a fake law writer of St. Louis, and the United States Circuit Court of Appeals of the 8th Circuit, has so ordered.

Unless, therefore, the Court advances beyond the doctrine laid down in any of its own carefully considered decisions, no case is made in this record for setting aside or disregarding the transfer of the shares in question at the instance of the receiver, and in the absence of the cross bill a decree should have passed under the prayer for general relief against the defendants thereto, Gruetter & Joers.

This last consideration seems to me to be a sufficient answer to the contention of counsel for Stuart and to the ruling of the Court of Appeals that the cross bill is not defensive to the original bill or rather to the complainants' amended bill. To this latter document Gruetter & Joers

were made parties, and they were required by subpœna to make full and true answer thereunto. The charges contained therein of collusion and combination, of their own insolvency at the date of the transfer, and of a fraudulent intent either on their own part or on that of Stuart to defeat the creditors of the bank or to prevent a collection of the assessment, and which were essential to a recovery by the receiver against Stuart, they could not and did not admit, because they were not true, and they knew, as the event proved, that they could not be proved. The amended bill contained a prayer for general relief, and, in case of their failure to appear and answer thereto in obedience to the subpœna, was subject to amendment without notice to them. In case of their default Stuart might have been excused and judgment rendered against them. But, although the receiver had not sufficient cause for setting the transfer aside, Stuart had been guilty of such wrongs towards them as conferred upon them right to that relief, and an opportunity for seeking it would never again be presented. This was the precise office of a cross bill as defined by the late Mr. Justice Miller in Schenk vs. Peay, 1 Woolworth, 165, Fed. Cases, 12450. The fact that their contention tended to aid the receiver in his attempt to recover from Stuart was a mere incident. If the statements of their cross bill were true—and they were proved to be—they had a right to have the transfer set aside and to have the responsibility of Stuart exhausted for the payment of the assessment before resort should be had to them. The exercise of this right would have been a restraint upon the receiver not the less because he was willing to pursue that course if the facts justified him in so doing. But suppose they had not asked

for relief in their own behalf; suppose there had been no cross bill and that the record had shown, as counsel for Stuart insists that it did show, that Gruetter & Joers were not only abundantly responsible at the date of the transfer, but continued so to be for months afterwards and down to the date of the hearing. In such case would not Stuart have been absolved and a decree passed against his co-defendants? That such might properly have been the result under the prayer for general relief is established by Tyler vs. Savage, 143 United States, 79, reported in S. C. R., page 340.

Suppose that Gruetter & Joers, instead of filing their cross bill, had exhibited an original bill exactly like it, would not the two causes having the same parties and relating to the same transaction have been consolidated, so that there would have been but one record of proofs, but one hearing, and but one decree which would have passed upon both bills? "A cross bill" says this Court, in Kingsbury vs. Buckner, 134 U. S., 650, quoting with approval from the opinion in Jones vs. Smith, 14 Ill., 229, "is proper whenever the defendants, or any or either of them, have equities arising out of the subject matter of the original suit which entitles them to affirmative relief which they cannot obtain in that suit." So, in Hurd vs. Case, 32 Ill., 45, the Court says, quoting from the syllabi: "When a defendant in chancery is entitled to affirmative relief in respect to the subject matter of the original suit, he can only obtain it by means of a cross bill."

"A cross bill must be confined to the subject matter of the original bill, *but the only limitation* as to new averments

therein is that they must grow out of and be connected with the subject matter of the original bill."

I am unable to distinguish between the principle for which I am now contending and that announced in this Court in Morgan's L. & T. R. and S. S. Co. vs. Texas Central Ry. Co., 137 U. S., 171, and 11 S. C. R., 61. In that case this Court says: "A cross bill," says Mr. Justice Story, (Ex. Pl., Sec. 389) *ex vi terminorum* implies a bill brought by the defendant in a suit against the plaintiff in the same suit or against other defendants in the same suit, or against both, touching the matters in question in the original bill." A bill of this kind is usually brought, either (1) to obtain a necessary discovery of facts in aid of the defense of the original bill, or (2) to obtain full relief to all parties touching the matters of the original bill." And as illustrative of cross bills for relief, he says (section 392): "It also frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross bill, or cross bills, to bring every matter in dispute completely before the court, to be litigated by the proper parties and upon the proper proofs." It seems to us that in order that a decree might be made upon the whole matter in dispute, brought completely before the Court, the bill in question was necessary, and was correctly styled a "cross bill." In no proper sense were new and distinct matters introduced by it which were not embraced in the original and amended and supplemental bills, and, while it sought equitable relief, it was such as, in point of jurisdiction over the subject matter, the Court was competent to administer. It may be that, so far as it

sought the further aid of the Court beyond the purposes of defense to the original bill, it was not a pure cross bill, but that is immaterial. The subject matter was the same, although the complainant in the cross bill asserted rights to the property different from those allowed to it in the original bill and claimed an affirmative decree upon those rights. A complete determination of the matters already in litigation could not have been obtained except through a cross bill, and different relief from that prayed in the original bill would necessarily be sought. This bill was filed, on leave, before the testimony was taken, and though there should be as little delay as possible in filing bills of this kind, yet that was a matter entirely within the discretion of the court, which could have directed it to be filed even at the hearing. And whether this bill be regarded as a pure cross bill, as an original bill in the nature of a cross bill, or as an original bill, there is no error calling for the disturbance of the decree because the Court proceeded upon it in connection with other pleadings. The jurisdiction of the Circuit Court does not depend upon the citizenship of the parties, but on the subject matter of the litigation."

It is true that a part of the relief sought by the cross bill in the case at bar does not differ materially from that sought by the amended bill of the complainant, but it is sought on entirely different grounds and upon facts which that amended bill ignores or denies, and, in the language of the opinion just quoted, "a complete determination of the matters already in litigation could not have been obtained except through a cross bill," and in fact will not be obtained if the judgment of the Court of Appeals shall be affirmed.

This appears, also, sufficiently from Tyler vs. Savage, 143 U. S., 79, already cited. Had Tyler been able to show by cross bill in that case that he was free from fraud and was, in common with the complainant, a victim of fraud by the company, he would have been enabled, not only to escape a decree against himself, but to have obtained restitution for whatever damage he had sustained by reason of that fraud. It may well have happened that the Circuit Court were of opinion that the case presented by the amended bill was not made out by the proofs, but that the case made by the cross bill was established thereby, and, if so, the decree of the Court based upon both bills was the only one that could properly have been passed. If the Court took this view, which the presiding judge announced orally at the time that he did take, it is clear to my mind that no error was committed in the determination of the cause. That the cross bill made a sufficient case for the relief granted by the decree and that the decree was no broader than was necessary for "a complete determination of all the matters in litigation" is shown not only by the opinion in Morgan's Co. vs. the Ry. Co., 137 U. S., 171, just cited, but in the decision elsewhere herein more fully referred to, and very similar to the case at bar, of the Florida Land and Improvement Co. vs. Merrill 52 Fed. Rep., 77. In support of the proposition that a Court of Equity having jurisdiction for any purpose will adjudicate the whole controversy and grant whatever relief may be necessary to that end, including an award of money by way of damages, compensation, or restitution, it cannot be necessary in this Court to cite additional authorities. Attention is invited, however, to Russells vs. Clarks express, 7 Cranch. 69, and to the text and notes in 1 Pome-

roy on Equity Jurisprudence, sections 181–223, and 231 *et seq.*

VI.

With an air of profound wisdom that fills the inexperienced country practitioner with inexpressible awe and admiration, the Court of Appeals announces that one who would rescind a contract must act promptly and without vacillation, and return, or offer to return, to the other party whatever of value he may have received by reason of the contract. Quite so. This is a proposition which, so far as I know, has never been disputed by lawyer or layman. Certainly not since the king's writs began to bear teste at Westminster, nor probably since the building of the first Roman basilica. A very cursory examination, however, of the authorities cited in this paragraph makes it quite plain that the principle has no application to the facts of the case at bar. If by means of fraud or false warranty I sell you an unsound or vicious horse for which you pay me a hundred dollars in money or securities, or both, you, upon discovering the cheat, may sue me for damages, thus affirming the contract, or you may return or offer to return the horse and sue me for recovery of the purchase price. This latter remedy is rescission, and the other is not, and if you pursue the other remedy first, or do any other act amounting to an affirmance you will be held so have elected, and your remedy of rescission will be gone. Nobody ever doubted this to be so. But, if you sell me a horse for five hundred dollars, four hundred of which I pay in money, and for the other one hundred of which I deceitfully induce you to accept a forged note, you may, upon discovering the cheat, sue me for the amount for which you accepted the note, or,

what is the same thing, the unpaid residue of the purchase money, and it has never hitherto entered into the mind of man that as a condition for so doing you must return me the four hundred dollars, so that I will have that sum as well as the horse and the money I have swindled you out of. Your action in such case is not only not for rescission, but it has not the least or most remote resemblance to that remedy. You do not sue for damages for the breach of contract of sale, because you do not allege that it has been broken, except by my default in payment, and you do not seek to rescind it because if you did so successfully, the contract being gone, you could have no action either for damages for its breach or to recover the unpaid portion of the contract price. What you in fact do is to sue upon the contract to compel its fulfillment by me. In such case your remedy at law would be complete, but if instead of a forged note I had induced you to accept a share of stock in an insolvent national bank you would have been compelled to resort to a court of equity, which alone would have been competent to relieve you from the burden of the assessment which you would have unwittingly assumed, and to such a suit the bank, or, in case of its insolvency, its receiver, would have been a necessary party defendant. But by so doing you do not rescind or attempt or propose to rescind the contract of sale of the horse, nor, because a court of equity is alone competent to enforce the contract, are you restricted to the remedy for its rescission. The Court of Appeals holds, in effect, that you are so bound; that you must either sue me at law for damages for a breach of the contract, which, however, I have nominally not broken, or tender me back the stock and the four hundred dollars and replevy the

horse which you do not want. After having done which, you would still be obliged to apply to a court of equity to obtain relief from the assessment. But it might well have happened, as in fact it did happen in the case at bar, that as soon as you got the four hundred dollars and before you had any knowledge or suspicion that you had been swindled by means of the stock, you had paid out the four hundred dollars in part payment of your own indebtedness and thus became powerless to tender that sum to me, so that, wholly without your fault, and by force of circumstances practically beyond your control, your remedy by rescission of the contract had been lost to you. As a matter of fact that is just what did occur in the case at bar: immediately upon closing the trade, and before Gruetter & Joers had any suspicion that they had been swindled, or that the bank stock was not as represented to them by Stuart, they paid out the nineteen thousand five hundred dollars received by them from him in discharge of their merchandise and other debts (see record, 150):

Q. Now, if the assessment had been collected at that time—at the moment of transfer—did you not have $15,000 in cash in your hands?

A. I don't know at the time or not whether I had or not. The most of them were certificates of the Capital National Bank.

Q. You collected them afterwards, did you not?

A. Yes, we did.

Q. So they were cash?

A. Yes, sir.

Q. And you had $19,500 from Professor Stuart at the very moment you received the transfer?

A. At the very moment we received them we turned part of them over to the bank for borrowed money and paid for merchandise east with them.

Q. Gruetter & Company had the benefit of it?

A. Yes, sir; certainly.

If the court of appeals is right, what were you to do in such case? Although the owner of considerable property and perfectly solvent, in the ordinary sense, you may not have had or been able to procure a hundred dollars with which to pay the assessment, but if you had had it would you have been compelled to pay it out for that purpose and then sue me for it together with the other hundred dollars unpaid purchase money, and have taken your chances of my beating an execution on your judgment? So the Court of Appeals seems to think. And possibly, too, if you had paid the assessment without objection, you would have been held to have "ratified" the transaction with respect to the stock, and would never have been able to obtain any judgment against me at all. In fact, under such circumstances you would have had no remedy at all as respects the assessments except that sought by the cross bill in the case at bar which the Court of Appeals dismissed. The upshot of the matter is that this new doctrine of the Court of Appeals makes your choice of remedies or right of election dependent not upon your volition, but upon my own, and upon circumstances beyond your control. Suppose, too, that I had sold and delivered the horse to some one outside the state, or broken one of his legs, or blinded his eyes, or taught him to kick, or run away, how about your remedy of rescission then? Or, take the case at bar:

suppose Stuart had conveyed the building to the man in Maine immediately after procuring title, or incumbered it, or burned it down, or suppose, owing to some commercial disaster or to indefinable general causes, it depreciated largely in value, as in fact it did do mainly because of the failure of the bank which was the sole cause of Gruetter & Joers' complaint; how about the remedy of rescission then? A right of election that forbids a man to elect or that limits his choice by the volition of his adversary or by contingencies beyond his influence or control is not a right of election at all, and the assertion that it is so is a contradiction in terms which to a country lawyer seems to be absurd.

In the case at bar, Gruetter & Joers were made parties to the amended bill and brought in by subpœna at the instance of Stuart. Suppose they had not exhibited their cross bill, but had filed their answer merely, or had suffered a default, and that a decree had been rendered by the Circuit Court against Stuart alone for the assessment. Suppose, then, that the decree had been pleaded by Stuart in bar of the suit in the State Court. Might not the last named Court have properly held that, having been parties to the suit in the Federal Court and had an opportunity to present the whole controvesry by cross bill so as to obtain a final determination of all the rights of all the parties growing out thereof, it was our own fault or negligence if we had not done so and that the same transaction would not be a second time investigated and that the plea should be sustained? Gruetter and Joers were in a "dilemma." I think that is what it is called by judges and by eminent lawyers who know how to use the language with an appet-

izing spice of Greek and Latin derivatives. Our Saxon forefathers might have said they were between "Old Nick and the Deep Sea."

If they had suffered default, or, answering, had confessed the allegations of the amended bill, they would have admitted that they had "colluded and combined" with Stuart to defeat the creditors of the bank by means of a sham and pretended transfer of the stock, and, in the face of such an admission, neither the Federal nor the State Court would have helped them either to recover the residue of the purchase price or to be relieved from the assessment. It would have been a sufficient defense in either case that they were by their own admission "particeps criminis." They were compelled, then, to answer the fact, viz.: that whether or not one of Stuart's objects was to defeat the creditors of the bank, which it might, for all they knew, have been, it was clear that one of his purposes and probably his main, if not his only, purpose, was to cheat and defraud them. So that, so far from "colluding and combining" with Stuart for any unlawful purpose, they had dealt with him in the most perfect good faith; that they had accepted his stock at twenty per cent premium in part payment for their property without any knowledge, notice, or suspicion that he was attempting or intending to cheat or defraud anyone, least of all the bank or its creditors, and that such being the facts no decree for the assessment ought to be rendered against them. So far as these facts were pleaded in their answer and sustained by the proofs they were defensive only, but they called for an investigation of the whole matter in dispute, and if they thought themselves entitled to any affirmative

relief by reason of them they were admonished, by elementary principles of jurisprudence, that they must demand it then, by apt pleadings, that is, by cross bill, or be forever after shut out, because, as already said, no Court would ever again investigate the same transaction for the determination of the same issues. All the relief they were entitled to upon these facts and issues they must claim and get then or forever after hold their peace. Their right was in the nature of a counterclaim, and it is settled law that if it had been used once for defense it could not have been again used for an affirmative judgment. This rule is very clearly and emphatically stated and enforced in Brirer vs. Fretz, 37 Kan., 37; S. C., 14 Pac. Rep., 558, the syllabus in which is as follows: "Where certain facts are pleaded as a defense in an action, and a final judgment rendered therein, necessarily deciding the merits of such defense, the same facts cannot again be the basis of an action between the same parties arising out of the same transaction, though in the former action the facts were pleaded as a defense only, and no claim made thereon for affirmative relief."

The opinion in O'Connor vs. Varney, 10 Gray, Mass., 231, seems to me to be exactly in point, and is as follows: "The presiding judge rightly ruled that the former judgment was a bar to this action. A party against whom an action is brought on a contract has two modes of defending himself. He may allege specific breaches of the contract declared upon, and rely on them in defense. But if he intends to claim, by way of damages for non-performance of the contract, more than the amount for which he is sued, he must not rely on the contract in defense, but must bring a cross ac-

tion, and apply to the court to have the cases continued so that the executions may be set off. He cannot use the same defense, first as a shield, and then as a sword. Bennett vs. Smith, 4 Gray, 50; Sargent vs. Fitzpatrick, 4 Gray, 511; Sawyer vs. Woodbury, 7 Gray, 499."

In Burnett vs. Smith, 4 Gray, 50, the first syllabus is as follows:

"To an action on a promissory note given in payment for goods, the defendant pleaded want of consideration, by reason of false representations of the payee concerning the value of the goods, and the plaintiff recovered judgment for a part only of the note. *Held*, that the defendant was barred of his action for false representations."

But it cannot be necessary to multiply citations upon so plain a point. A large number of authorities to the same effect are collected in paragraphs 173–174 of Vol. 1 of Van Fleet's Former Adjudication, and attention is especially called to Horner vs. Kilander, 135 Ind., 600 (34 N. E., 697), set forth at large as a note to paragraph on page 441.

The contention by counsel for appellant, that cross complainants are remediless, unless and until they make a tender or repayment of the sum of money, amounting to about $19,500 which Stuart paid them as part consideration for the conveyance to him of the real property, arises from an entire misconception of the case and of the rights of the parties arising thereunder. Gruetter & Joers did not trade with Stuart for his stock, but sold him their property for $37,500 subject to an incumbrance. With this sale

they are entirely satisfied. They have no desire to rescind it, and it is extremely doubtful if they could successfully maintain an action so to do. There was no fraud or mistake mutual or otherwise, concerning it. They agreed to sell, and did convey, the property for the agreed consideration stated, but Stuart, instead of paying them that sum, paid them $19,500 only, and fraudulently induced them to accept for the remaining $18,000 some bank shares which were not only valueless, but threaten them with a personal liability of $15,000 and interest. It is this wrong which they seek to have redressed.

They are entitled to be paid the residue of their purchase money, and to be relieved from an obligation which they unwittingly assumed, and are not required, as a condition therefor, to buy justice, either by foregoing the benefit of their sale or by repaying Stuart the $19,500, which he did pay them on account of his purchase from them. The language of the court in Pierce vs. Wood, 23 N. H., 519–534, is accurately applicable to the case at bar. The court say

"The doctrine of the rescission of contracts will hardly apply to a case of this kind. The whole foundation of the plaintiff's right to recover rested upon the question of fraud. If fraud was made out, then the plaintiff could recover, otherwise not; and the whole trial proceeded upon that ground. Fraud being established, the compromise became void, and the plaintiff's entire debt would at once be revived and a clear right of action exist in his favor. And it appears to us that it would be a singular doctrine to hold that, before an action can be maintained to recover the balance, that portion of the plaintiff's demands which have been paid must

first be refunded; that before he can institute a suit for the amount out of which he has been defrauded, he must first repay that which was honestly his due, and which, so far as he was concerned, he has honestly received. Such a rule would be offering a premium for fraud; and in most cases of this kind a plaintiff might better retain the per cent which he has received than relinquish that for the uncertainty of recovering the whole."

This case was expressly approved and followed in the somewhat similar case, Moody vs. Brown, 58 N. H., 45. That case arose out of the following facts as stated by the Court:

"When the defrauded party elects to treat a fraudulent exchange of chattels as void, and the other party's possession of his property as tortious, a demand is not necessary to enable him to maintain trover.

"And when the title of the chattel received by him, fraudulently represented to be good, had wholly failed, he may rescind the exchange without transferring to the fraudulent party a good title which he has obtained from a third person.

"The measure of damages in such a case is the value of the property received by the defendant in the exchange.

"In trover for a receipted account of the plaintiff against the defendant, the measure of damages is the value of the document. There is no legal presumption that its value as a chattel is the value of the chose in action or the amount of the debt set forth on the paper."

In the opinion the court say:

"When a plaintiff has been fraudulently induced to receive part payment in full satisfaction of the defendant's debt, on a compromise, he can recover the balance without returning what he received."

In Martin vs. Roberts, 5 Cushing, 126, the syllabus prepared by the court is as follows:

"Where the vendor of an article received in payment therefor a promissory note of a third person, falsely and fraudulently represented by the vendee to be solvent, together with an order on a third person for goods, which was duly paid, and the vendor returned the note to the vendee on discovery of the fraud, it was held that the vendor might maintain an action of assumpsit to recover the price of the article sold, deducting therefrom the amount of the order, without returning the latter."

And in the opinion the court say:

"The defendant insists that this action cannot be maintained, inasmuch as the plaintiff has not returned the order for groceries, taking the position that, without returning the entire consideration, the plaintiff has no right to maintain his action for the price or any part thereof. Various authorities were cited by the counsel for the defendant to establish the doctrine that, if a party would rescind a contract entered into through fraud or misrepresentation, he must return the whole consideration received. In the case of rescinding a contract, in the full and proper sense of the term, this may be so, but the doctrine has no application to

a case like the present. If the plaintiff had sought to recover, in an action of replevin, the specific articles sold to the defendant, and had not returned the order for groceries, the objection might have been well taken that, before the plaintiff could enforce a claim to property in the articles thus sold, he must restore to the other party all the valuable consideration that he received from him.

"But the plaintiff does not seek to rescind the contract of sale, or to reclaim the property sold by him to the defendant. He gives full effect to the sale; he counts upon it in his writ, and only seeks to recover damages by reason of non-payment of the same. Such non-payment he seeks to establish by proof that so much of the payment as was to be realized from the note of John Thing has entirely failed to be realized by reason of the worthlessness of that note, which note, it was agreed, was taken upon the false and fraudulent representation of the defendant as to the solvency of the maker.

"This being the case, the defendant has failed, to the amount of this note, to pay the plaintiff for the articles bought of him. It is as though no such note had been delivered to the plaintiff, and to this extent the plaintiff is the creditor of the defendant on account of the articles sold. The principle upon which the right of the plaintiff to recover rests is a very clear one, and will entitle him to retain his verdict. The supposed payment has proved delusive. The vendor received in payment an article of no value, and this through the fraudulent representations of the defendant. He may demand that this loss may be made

good to him. Puckford vs. Maxwell, 6 T. R., 52; Young vs. Adams, 6 Mass., 182, and cases there cited."

In Bridge vs. Batchelder, 9 Allen, 394, the syllabus is: "One who, as part payment for goods sold, has received promissory notes of a third person upon false and fraudulent representations by the purchaser that the notes were given for value and were good, may maintain an action against such purchaser to recover so much of the price of the goods as the notes were intended to pay without first offering to return the notes. It is sufficient if they are filed in court at any time before final judgment in the action."

And in the opinion the Court say, Bigelow, C. J.:

"We are unable to see any insuperable legal obstacle in the way of plaintiff's recovery in this action. The evidence as stated in the exceptions was amply sufficient to warrant a jury in finding that the plaintiff's intestate was induced to take the notes of Cook in payment for a portion of the purchase money of his share of the schooner by the false representations of the defendant, made fraudulently with an intent to deceive, the defendant well knowing the representation to be false. If so, then it is clear that the purchase money has not been paid in full, and the plaintiff can well maintain an action of assumpsit to recover so much of the agreed price as the notes of Cook were intended to pay. The case stands as if the defendant had given counterfeit bank notes in payment, knowing them to be false and representing them to be genuine.

"It is no answer to say that the whole contract for the sale and purchase of one-eighth of the schooner is not re-

scinded, and that the plaintiff still retains a portion of the consideration which was paid therefor. This ground of defense might have been available in an action brought to recover back the thing sold. But this action does not proceed at all on the ground of rescission. On the contrary, the plaintiff affirms the sale fully, and only seeks to recover damages consequent on the non-payment of the stipulated price. The alleged payment has proved to be inoperative by reason of the false and fraudulent representations of the defendant. This point was distinctly adjudicated and settled as the law of this commonwealth in Martin vs. Roberts, 5 Cushing, 126, a case very like in its facts to the one at bar."

"Nor is it at all material that the worthless notes which were delivered to the plaintiff's intestate were not given up and surrendered to the defendant before or at the trial of the case. The omission to do so can have worked no possible harm to the defendant, and substantial justice would have been done if the plaintiff had placed them on the files of the court to be delivered to the defendant at any time before final judgment should have been rendered in his favor. This can now be done in the event that upon a new trial he shall establish the alleged false and fraudulent representation s."

VII.

The contention that cross complainants were required, as a precedent condition to maintaining their bill, to return or tender the certificates of stock has even less foundation than the other. The certificates are not the shares, but merely evidences of the ownership of them, and the sole object of

the cross bill is to restore that ownership to Stuart by compelling his reinstatement as shareholder upon the books of the bank, and obtaining a decree of the court that he is, and at all times had been, the true owner of the stock. If there is any more emphatic or unequivocal way of making a tender it is hoped that counsel for appellant will point it out.

However, the doctrine that one who seeks to rescind must restore, or offer to restore, the *status quo*, is not, as counsel seems to suppose, a hard and fast rule of law, but an equitable principle only. Consequently courts of equity do not require its observance except in cases in which such requirement is indispensable to the equitable adjustment of the rights and obligations of the litigants. The nature, extent, and limitations of the doctrine are well stated in the opinion of the Court in Babcock vs. Case, 61 Penn. State, 427, from which I quote the following:

"As a general rule, in the cases of executed contracts, this is true. Rescission on the ground of fraud, failure of consideration, and the like is a right in equity subject to a restoration of the consideration; consequently, in order to obtain equity, it lies on the party seeking it to do equity; that is to say, he must return the property obtained or reconvey the title. If this be the equitable requirement, a failure in that particular would ordinarily be followed by a denial of the equity demanded. But if the thing, the consideration for which is sought to be recovered back, be entirely worthless, there would be no duty to return it. Thus we hold in Flynn vs. Allen, a case from Potter county, 7 P. F. Smith, 482. We decided that the return of the worthless township orders bought by plaintiff from the defend-

ants was not essential to the plaintiff's right of recovery. As nobody can have an equity in a thing worthless in itself, it must follow that the restoration of such a thing will not be required in equity. Wherever the question of restoration arises it is an equitable question, and is to be dealt with on equitable principles. If there be no value in the conveyance, for instance, and no right of recourse on any one for a reconveyance, would the want of such a reconveyance having been tendered outweigh a plaintiff's equity to have his money back, who had been egregiously defrauded? If it would not, a reconveyance would not be required. It is only required in order to prevent the party holding the thing paid for, and recovering the price, also, that a return is essential in equity. If the thing be worth nothing, of what consequence is a reconveyance or return of it?

The plaintiff below did not show that a reconveyance by the plaintiff to him would be of any value. What equity had he to have it therefore? It must be remembered that if the plaintiff was defrauded it avoided the conveyance, and his right was complete to his money. It never lawfully passed out of him. The right to have it again depended on what might appear in the defense. He could not know that the defendant would insist on a reconveyance of a worthless title, and was not bound to make a reconveyance or tender one. If any value appeared in it, however, a condition to reconvey in the verdict would effectually do equity to the premises. Indeed, after verdict, if it should come to light that a reconveyance ought to be made, it is within the equitable power of the court to restrain execution until it be made. In all cases, therefore,

the equity of the defendant is to be judged of and administered, if it be an equity at all, and if it be not, the claim goes for nothing. If equity required a reconveyance to precede suit, it will be so administered; if it can be protected on the trial as it may in almost every possible case, it will be so administered. If there be no equity in the case, but only an assumption of it, it ought to be disregarded. That was the category, it seems to us, in which the defendant's claim to equity stood. Should the court below be of opinion, however, that justice demands a reconveyance to be made to the defendant, it might restrain the execution until it be made."

To the same effect is Smith vs. Smith, 30 Vt., 139, and generally when one party has been guilty of actual fraud a tender of restitution is not required of the plaintiff.

1 Bigelow on Fraud, 429, and notes.
Gould vs. Cayuga Bank, 86 N. Y., 75.
McCaskey vs. Graff, 23 Penn. State, 321.
Sands vs. Codwise, 4 Johns., N. Y., 597.
Gilbert vs. Hoffman, 2 Watts, 66.
Weeden vs. Hawes, 10 Conn., 50.
Knappen vs. Freeman, 47 Minn., 491.
Nelson vs. Carlson, 55 N. W. R., 84.
McCorkell vs. Korhoff, 58 N. W. R., 913.

VIII.

Enough has already been said, it is hoped, with respect to promptitude of action on the part of cross complainants.

The action in the state court, which is a repudiation of the

transfer of the stock, was begun on the first business day after the bank suspended and the plaintiffs became aware that the shares were valueless. They answered and filed their cross bill in this action as soon as they were challenged so to do by subpœna issuing out of the Circuit Court. The pendency of the suit in the state court is no bar to the cross bill, *first*, because cross complainants are not voluntarily here, but, being here, are entitled to have all their rights adjusted and to avail themselves of all the remedies appropriate in the proceeding to which they have been made parties. *Second*, because the parties to the several suits and the relief sought are not the same. The remedy pursued in this action is not within the power of the state court to grant. *Third*, because a suit in one jurisdiction cannot be pleaded in bar or abatement of a subsequent suit in another jurisdiction between the same parties seeking identical relief.

Kilpatric vs. Kansas City and B. R. R. Co., 38 Neb., 620–641.
Gordon vs. Gilfail, 99 U. S., 168.
Sharon vs. Hill, 22 Fed., 28.
Stanton vs. Embrey, 93 U. S., 548.

IX.

Probably it will not be contended that the act of congress of 1887 affects the jurisdiction of the circuit court in suits to which national banks are parties in cases in which a Federal question is involved. If so, the matter was set at rest in Petri vs. Commercial National Bank, 142 U. S., 64.

The contention that the controversy upon the cross bill is wholly between the complainants and the defendants therein is without foundation. The relief sought thereby against the receiver is of precisely the same character as that prayed and obtained by original bill, in Florida Land and Improvement Company against Merrill, 52 Fed., 77, and in Schenck vs. Peay, 1 Woolworth, 175.

It is true no injunction is prayed because the final decree discharging cross complainants from liability to the receiver renders one unnecessary, but it will scarcely be contended that such a decree would be effectual as against the receiver if rendered in a preceeding to which he was not a party. On the other hand, it will doubtless not be argued that such a decree in a suit to which Stuart was not a party would obligate him to pay the assessment or be in any way conclusive upon him in a subsequent action by the receiver against him. If it be granted for the sake of argument that Gruetter & Joers are entitled to that portion of the relief awarded them by the decree of the circuit court by which they are relieved from the assessment and liability therefor is imposed on Stuart, then it is very clear that such relief could only be obtained in a suit in which Stuart and the receiver are both parties defendant. And whether they are entitled to do it or not, the question whether they are so under the circumstances of this case is one which requires for its solution the interpretation of Federal laws and statutes, and otherwise cannot be answered. So that it seems that the jurisdiction of the circuit court over the controversy to this extent is beyond dispute. Such being the case, the authorities above cited warrant no other conclu-

sion than that the Court rightly adjudicated all the controversies between all the parties which are connected with, and auxiliary to, the subject matter within its jurisdiction, and that the decree of the circuit court is right and ought to be affirmed.

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